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Witness Testimony

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Effects of Citizen Suits Under the Endangered Species Act Upon Non-Federal Landowners

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The Arizona State Land Department

The Arizona State Land Department is an agency of the State of Arizona that manages approximately 9.4 million acres of land which the State holds in trust for the benefit of Arizona's common schools and certain other public institutions. These lands ("State Trust Lands") comprise approximately 12.9% of the total land ownership in Arizona, and are distributed throughout those portions of the State that lie outside the boundaries of federal parks, forests and reservations (42.1% of the total) and Indian reservations (27.4% of the total). [See map attached] The State of Arizona has a fiduciary responsibility to manage the State Trust Lands for the best interests of the trust, and to produce appropriate revenues over the long term to financially support the trust beneficiaries. Although it is a department of state government, with respect to issues arising under the Endangered Species Act, the State Land Department has the same general interests and concerns as a private landowner. Federal actions that directly or indirectly limit or burden the use and development of State Trust Lands, or facilities needed for the profitable use and development of State Trust Lands, may sharply reduce the value of those lands.

Examples That Illustrate How Citizen Suits Can Affect State Trust Land

Although most citizen suits filed to enforce provisions of the Endangered Species act are brought against federal officers or agencies, such suits can have significant effects upon non-federal landowners. Suits that seek to enforce "mandatory deadlines" under the Endangered Species Act, which limit the time allowed for the Fish and Wildlife Service to perform the duty at issue, not only truncate the opportunity for public comment and consideration of public comment, they may result in a substantively flawed decision because the time and resources available to the agency simply do not permit fuller analysis. In such cases the agency invariably errs on the side of the listed species, resulting in more limitations on the activities of agencies and landowners. *Silver v. Babbitt,* described below, is but one example of this type of action.

Suits to enforce other duties under the Endangered Species Act generally seek broad, dramatic injunctive relief prohibiting or limiting activities alleged to actually or potentially "harm" species. The language of Section 7(d) of the Act, which prohibits "any irreversible or irretrievable commitment of resources with respect to any agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures. . ." after consultation is initiated, affords litigants a strong statutory basis for injunctive relief. Because consultation must be re-initiated after any species is listed, the

Ninth Circuit has recognized a duty to consult at the program level as well as the project level, and agency resources are limited, suits to compel consultation are used as a vehicle to stop on-the-ground activities across the landscape. *Silver v. Thomas*, described below, is an example of this type of action.

Suits alleging that land management decisions or activities may cause "harm" and therefore result in take of listed species may also seek broad injunctive relief. Plaintiffs in such suits are aided significantly by the judicial gloss on the Endangered Species Act, such as the statements in *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), which found that Congress intended to reverse the trend toward species extinction whatever the cost, and therefore tend to err on the side of presuming harm to listed species. *Southwest Center for Biological Diversity v. U.S. Bureau of Land Management*, and *Forest Guardians v. U.S. Forest Service*, described below, are examples of this type of litigation.

Typically neither the plaintiffs who file citizens suits nor the affected federal agencies give notice of the action to third parties who might be affected. Also, the federal defendants frequently stipulate to judgment as to all or part of a case, and plaintiffs often seek injunctive relief or summary judgment shortly after the answer is filed. Consequently, unless a party has the resources to continually monitor the court files, or happens to receive information about a lawsuit, it may not learn of the pending action and intervene in time to participate effectively. *Southwest Center for Biological Diversity v. Babbitt*, described below, is an example of such a situation.

Although the federal defendants generally do not oppose "permissive intervention," the Justice Department typically does oppose intervention as of right, and plaintiffs usually oppose intervention, on the ground that the matter at issue is whether the federal agency has violated some mandatory duty, and the federal defendants adequately represent the interests of all affected parties. In fact, the federal defendants may settle claims through agreements that are ultimately harmful to third parties. *Silver v. Thomas* and *Forest Guardians v. U.S. Forest Service*, described below, are examples of such settlement.

The Department questions whether Congress intended federal priorities in the realm of species protection to be directed by civil suits and federal courts, rather than the federal agencies responsible for such activities. To the extent that scarce resources available to the federal agencies are devoted to the defense of litigation, they diminish the resources available to conduct consultations, develop recovery plans, and review or develop habitat conservation plans and other conservation measures.

The following specific examples may be helpful to illustrate how citizens suits, or the threat of citizens suits, may affect State Trust Lands, or impair the Department's opportunity to participate in or otherwise affect decisions that may affect State Trust Lands.

1. The Mexican spotted owl

Deadline for Designation of Critical Habitat: Silver v. Babbitt

On March 16, 1993 the Fish and Wildlife Service published a final rule listing the Mexican spotted owl ("MSO") as a threatened species.(1) The Service did not publish a proposed rule to designate critical habitat for the MSO within the time specified by law. In 1994, Robin Silver brought suit in the United States District Court for the District of Arizona to compel the Service to designate critical habitat for the species.(2) The State Land Department moved to intervene in that lawsuit, asserting its interest in assuring that there would be adequate opportunity for notice of and public comment on the proposed designation, and that the process would result in a rule that was both substantively and procedurally sound. The motion to intervene

was denied, on the ground that the suit would merely establish a deadline for action by the Service, and would not determine the substance of the final rule.

As the State Land Department had feared, the Court set an unrealistically short deadline for action by the Service, the public had no meaningful opportunity to comment upon the economic and other impacts of the designation, and the final rule did not adequately address the concerns articulated by the Department and others. The District Court ordered that the proposed rule be published by December 1, 1994, and that the final rule be published by May 27, 1995. The Service's analysis of economic and other impacts did not begin until after the proposed rule was published, and the draft economic analysis was not available to the public until March of 1995. Although the Service had estimated that its own internal review of the draft economic analysis would require five months, members of the public had only 60 days or less to obtain, review and comment upon the Draft Economic Analysis, and the Service had only twenty days to analyze and respond to public comment. The Service made no significant changes to the designation of critical habitat as a result of its consideration of economic and other impacts, or its consideration of public comments.

Shortly after the final rule designating critical habitat was published, the Service published its Draft Recovery Plan for the MSO. Whereas the critical habitat rule designated approximately 4.7 million acres of forested land as "critical habitat" for the MSO, much of that land was characterized by ponderosa pine and other forest types that were not identified in the Recovery Plan as habitat needed by the MSO.[(3)] The Recovery Plan made it apparent that the final rule designating critical habitat was grossly over inclusive.

Ultimately the Department brought an action to challenge the final rule designating critical habitat, in which it asserted numerous violations of the Administrative Procedures Act, the Endangered Species Act, and the National Environmental Policy Act.[(4)] In a parallel case, the New Mexico district court determined that the rule was invalid because the Service had failed to comply with NEPA.[(5)] On March 25, 1998 the Service published a notice in the Federal Register to acknowledge the court-ordered invalidation of the critical habitat designation for the MSO and to remove it from the Code of Federal Regulations.[(6)] On May 29, 1998 Robin Silver filed a motion to reopen *Silver v. Babbitt*, ostensibly seeking to "enforce" the 1994 judgment by compelling the Service to readopt the flawed critical habitat rule. That motion is now pending.

"Programmatic Consultation": Silver v. Thomas

Also in 1994 Robin Silver and the Southwest Center for Biological Diversity brought suit in the District of Arizona against Jack Ward Thomas, then chief of the U.S. Forest Service, seeking to enjoin all timber harvesting, range, oil and gas, mining and road projects and other "ground disturbing activities" throughout Region 3 national forests and on Navajo tribal forest lands (over 21 million acres of land) on the ground that the Forest Service had failed to initiate "programmatic consultation" with the Fish and Wildlife Service, and that such activities where therefore prohibited by Endangered Species Act section 7.[(7)] The State Land Department moved to intervene in the action, asserting financial and other interests in continued timber harvest activity, and grave concern about the effects of the injunction upon forest health and the increased likelihood of wildfires. The district court denied the motion in a one line minute entry order that referred back to its earlier order denying the State's motion to intervene in *Silver v. Babbitt*.

In September of 1994 the district judge issued an injunction that prohibited timber harvesting activities not specifically approved by the plaintiffs in millions of acres of land in Arizona and New Mexico. Although the decision to enjoin timber harvesting activities was made by the district judge, the federal defendants

eventually stipulated to a somewhat narrower injunction that would remain in effect pending the conclusion of the Section 7 consultation process, and waived the right to appeal. When the biological opinion was issued in the late spring of 1995, the plaintiffs took the position that it did not satisfy the requirements of Section 7, and brought proceedings to continue the injunction in effect until a legally sufficient biological opinion was issued. The injunction was not terminated until November of 1996, and caused or contributed to the closure of several of the few remaining timber mills in Arizona.

2. The cactus ferruginous pygmy owl

The cactus ferruginous pygmy owl is a small bird that has a historic range extending from central and southern Arizona south through western Mexico, and from southern Texas through northeastern Mexico, that was listed as endangered in Arizona.(8) It is estimated that there are over 500,000 acres of "suitable habitat" for the owl in Pima County, and as much as 1.5 million acres of such habitat throughout the State of Arizona. A great deal of that land is State Trust Land, including both urban and non-urban lands north of Tucson. There are approximately 31 known pygmy owls in the State, however very little land has been surveyed for owls.

During the fall of 1997, after the cactus ferruginous pygmy owl was listed as endangered in Arizona, the Southwest Center for Biological Diversity brought suit to compel the Fish and Wildlife Service to designate critical habitat, for the bird.(9) That suit is still pending. If the Service is compelled to designate critical habitat the State Land Trust Land may ultimately be affected by the designation. If unreasonable deadlines for adoption of a rule designating critical habitat are established, the State Land Department and others may be deprived of the opportunity to provide meaningful comment, as was the case with the MSO.

The Southwest Center for Biological Diversity and others also threatened to sue the Amphitheater School District if the district proceeded to build a high school on a 73 acre site that it had purchased for that purpose, based upon their contention that one or more pygmy owls had been sighted on neighboring lands. Shortly thereafter the Arizona Ecological Services Office sent notices to Pima County, a political subdivision of the State of Arizona, and certain municipalities that regulate land uses, in effect stating that although the Service could not force those entities to revise their land use ordinances and procedures, it could and would prosecute responsible officials who issued building permits, grading permits, or permitted rezoning that would allow private landowners to remove vegetation from lands that provide "suitable habitat" for the cactus ferruginous pygmy owl, and who thereby caused "harm" to the owl. This led to the development of requirements that landowners whose property fits the very broad profile of "suitable habitat" for the pygmy owl must survey for owls over a two year period before they may develop their property, whether or not owls have ever been sighted near the property.

The BLM has also taken steps to exclude or limit cattle on grazing allotments that fit the profile of "suitable habitat," without regard to whether those lands are now or ever have been occupied by pygmy owls. This affects the management of State Trust Lands, because in many cases State Trust Lands are included with private and federal lands within various ranches and ranch units. For example, if ranchers are required to construct fencing to exclude livestock from portions of a ranch, the cost may be quite high, and it may become infeasible for the rancher to continue using the allotment. Both the cost of fencing and forced exclusion of cattle from allotments may impair the financial viability of the entire ranch. Ranchers may shift livestock from federal lands to State Trust Lands, which are then in danger of being overgrazed, or they may be forced out of business entirely, perhaps depriving the State Trust Lands of an otherwise responsible lessee and land manager.

3. Multiple Species: The BLM Safford District Grazing Program.

In 1996 the Southwest Center for Biological Diversity brought a lawsuit against the U.S. Bureau of Land Management seeking to compel the initiation of "programmatic consultation" pursuant to Section 7 of the Endangered Species Act and seeking to enjoin all livestock grazing on lands managed by the BLM throughout its Safford District pending the conclusion of consultation on the ground that livestock grazing was causing incidental take of 23 listed species.(10) The State Land Department and certain Arizona counties moved to intervene; the Department asserted that the federal lands at issue are commingled with State Trust Lands and private lands, and that they form an essential component of most working ranches. The Court could not enjoin livestock grazing on BLM lands within the Safford District without also affecting the State Trust Lands. In this case, the motion to intervene was granted.

The federal defendants stipulated to some of the relief sought (initiation of consultation) before the State Land Department intervened. The Intervenors proposed that the Center defer the litigation of its "take" claims until the consultation was completed, but the Center refused to do so. Instead, it filed a motion for summary judgment. In its motion, the Center did not identify particular species or members of a species alleged to have been "taken" by specific actions or habitat modifications occurring at a particular time and place on one or more of the 288 individual grazing allotments on BLM administered lands within the Safford District. Instead, it argued that illegal take must be occurring because livestock grazing ***may*** cause adverse impacts to various protected species or their "habitats" which ***may*** be present ***somewhere*** within the Safford District--more than 1.6 million acres (approximately 2,500 square miles) of public lands scattered over a vast area that extends from the New Mexico border as far west as Picacho and Eloy, and from the international border with Mexico as far north as Safford and Morenci. On that basis, the Center argued that all livestock grazing within the BLM's Safford District should be enjoined to prevent "unlawful take" of listed species.

The Intervenors expended considerable time, effort and funds to employ attorneys and experts to oppose the motion for summary judgment and to prepare a cross-motion for summary judgment. After those papers were filed, and shortly before the federal defendants' responsive papers were due to be filed, the federal defendants and the Center stipulated to stay all proceedings in the case pending the conclusion of the consultation process. Had the Intervenors not been involved, it is certainly possible that the federal defendants would have stipulated to an injunction or other relief that would adversely affect the ranchers managing 288 allotments and leases, comprising 1,588,258 acres and averaging 145,537 annual animal unit months of use, as well as the State Land Department.

4. Five "Cienega Species: Southwest Center for Biological Diversity v. Babbitt

In 1996 the Southwest Center for Biological Diversity brought an action against the Fish and Wildlife Service seeking to compel the listing of the jaguar and the designation of critical habitat for the cactus ferruginous pygmy owl, the Huachuca water umbel, the Canelo Hills ladies tresses, and the tiger salamander.(11) Because State Trust Lands provide suitable habitats for these species and could be affected by the designation of critical habitat, State Land Department filed a motion to intervene. The district judge never ruled on the motion to intervene. Instead, the court granted a motion for summary judgment and issued an order compelling the Service to adopt final rules listing the jaguar and designating critical habitat for the other species.

Because the court's order appeared to direct the agency in the exercise of its discretion, the federal

defendants filed a motion for clarification of the order; when it was not timely clarified, the federal defendants filed an appeal. Thereafter the district court clarified its order, and the appeal was dismissed.

5. Multiple Species: Southwest Center for Biological Diversity v. U.S. Forest Service and Forest Guardians v. U.S. Forest Service

In late 1997, environmental activists filed two parallel lawsuits that would potentially affect the management of livestock grazing on 21 million acres of national forest lands in Arizona and New Mexico.[(12)] These suits alleged that by allowing livestock grazing on forest allotments in six national forests in Arizona and New Mexico, the Forest Service had violated Sections 4, 7, and 9 of the Endangered Species Act, its duties to promote diversity of species pursuant to the National Forest Management Act, and its duties under Section 401 of the Clean Water Act, to obtain state certification before authorizing activities that may prevent waters from meeting federal water quality standards. The Coalition of Arizona and New Mexico Counties, and the Arizona and New Mexico Cattle Growers Associations moved to intervene.

The two suits were consolidated on February 17, 1998, and on March 3, 1998 Forest Guardians filed a motion for a preliminary injunction, to prevent livestock grazing in riparian areas on specified allotments pending the conclusion of the litigation. The federal defendants and Forest Guardians sought to resolve the injunction issue by stipulating to certain modifications to grazing allotments. When the district judge declined to accept the stipulation, because it did not include the Intervenors, the federal defendants and Forest Guardians reached a settlement agreement as between themselves, and the hearing on the request for injunction was vacated. Although the Department was not directly involved in this litigation, we understand that the effect of the settlement agreement, at least with respect to some allottees, was to unilaterally change certain allotments by amending annual operating plans to require the allottees to exclude cattle from portions of those allotments at the allottee's expense.

The settlement agreements, in paragraph 2, require the Forest Service to exclude livestock from "at least 99% of the occupied, suitable but unoccupied, *and potential* habitat" of several species, including the Southwestern willow flycatcher, the loach minnow, the spikedace, and the MSO. They provide in various paragraphs that the Forest Service will direct allottees to remove livestock from an allotment that is found to contain occupied, suitable, or potential habitat for these species, through modification of the Annual Operating Plan. The effect of such settlement agreements is to direct federal actions that affect allottees, without giving the affected allottees any opportunity to contest the action. If the matter were litigated, the allottee might reasonably be expected to prevail if he challenged the unproved assumption that livestock grazing in potential habitat for the MSO causes harm to that species. Because the settlement agreement concedes that issue, the allottee will have no opportunity to challenge it.

Suggestions for Reform

Congress should consider amending the Endangered Species Act to redress the concerns identified in this testimony. To lower some of the barriers to participation by interested and affected parties, Congress could provide a right of intervention for persons who may be significantly affected by the relief sought in a citizen's suit. Congress could also require that each sixty day notice of intent to sue be accompanied by a one-paragraph summary of the claim that could be published in the Federal Register, and then require the relevant federal agencies to publish the summaries and to publish notice of each citizen suit that is filed when the complaint is served on the agency.

To reduce the likelihood that federal agencies will stipulate to relief that will adversely affect third parties,

Congress could provide statutory guidance to courts by establishing thresholds for injunctive relief that would moderate the current presumption of harm to listed species.

Congress should consider amending Section 7(d) of the Endangered Species Act to strengthen the ability of the federal action agency to determine which activities may proceed pending the conclusion of consultation. The possibility that a federal action may alter unoccupied, *potential* habitat for a listed species should not be a justification for broad injunctive relief. It should also consider adopting provisions that provide greater opportunities for participation in the process by those who will be affected by the federal actions, and some provision that would allow the federal agencies and the courts that review their actions to take into account the relative costs and benefits of a proposed decision. The presumption that any harm to listed species, no matter how small (*e.g.*, alteration of potential habitat) outweighs any harm to affected third parties, no matter how great, should be modified.

Congress should not allow federal conservation policies to be dictated by private litigants. Assuming that species protection is not the only federal priority, and that the federal agencies responsible for conservation will be operating within some budget that reflects the relative priority of their activities, those agencies should be allowed to establish budget priorities within the parameters fixed by Congress. Congress should reconsider the wisdom of providing for unlimited awards of attorney's fees to those who bring citizen's suits against federal agencies to enforce provisions of the Endangered Species Act. Such awards, particularly when coupled with "mandatory deadlines" established by the statute, provide financial incentives for plaintiffs to bring lawsuits to compel agencies to take actions, and thereby direct agency priorities and activities.

Supplemental Information

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ENDNOTES

1. 58 Fed. Reg. 14248.
2. *Silver v. Babbitt*, United States District Court for the District of Arizona, Case No. CIV 94-337 PHX CAM.
3. USDI Fish and Wildlife Service, *Recovery Plan for the Mexican Spotted Owl: Vol. I* (Albuquerque, New Mexico, December, 1995) at pp. 82-96.
4. *Hassell v. Babbitt*, United States District Court for the District of Arizona, Case No. CIV 95-2893-PHX PGR.
5. *Coalition of Arizona and New Mexico Counties for Stable Economic Growth v. Fish and Wildlife Service*, United States District Court for the District of New Mexico, Case No. CIV 95-01285M.
6. 63 Fed. Reg. 14378 (Mar. 25, 1998).
7. *Silver v. Thomas*, United States District Court for the District of Arizona, Case No. CIV 94-1610 PHX CAM.
8. U.S. Fish and Wildlife Service, Final Rule, Determination of Endangered Status for the Cactus Ferruginous Pygmy-Owl in Arizona, 62 Fed. Reg. No. 46 10730 (March 10, 1997).
9. *Southwest Center for Biological Diversity v. Babbitt*, United States District Court for the District of Arizona, Case No. CIV 97-704-TUC-ACM (filed October 31, 1997).

10. *Southwest Center for Biological Diversity v. U.S. Bureau of Land Management*, Case No. CIV 96-011-TUC-RLT.
11. *Southwest Center for Biological Diversity v. Babbitt*, United States District Court for the District of Arizona, Case No. CV 96-2317-PHX-RGS.
12. *Forest Guardians v. U.S. Forest Service*, United States District Court for the District of Arizona, Case No. CIV 97-2562-PHX-SMM and *Southwest Center for Biological Diversity v. U. S. Forest Service*, United States District Court for the District of Arizona, Case No. CIV 97-666-TUC-JMR.

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